

**Federal-Tribal Leadership meeting
December 3, 2015
Treaty Rights at Risk Initiative**

MARINE SHORELINE HABITAT: Highest Astronomical Tide

Issue: The USACE Seattle District (NWS) utilizes the mean higher high water (MHHW) tidal datum as the landward extent of Clean Water Act (CWA) regulatory jurisdiction, and has been doing so since the 1970's when the CWA was promulgated. In Puget Sound, the MHHW is 1.5 to 2.5 feet below the highest astronomical tide (HAT). Property owners often choose to construct their shoreline armoring or other shoreline protection projects above the MHHW. As a result, a Department of the Army (DA) permit and associated consultations under the Endangered Species Act (ESA) under section 7 are not required. Many shoreline armoring actions in Puget Sound have been, and continue to be, constructed above the MHHW, negatively impacting valuable shoreline habitat. Consequently, there is no certainty the aquatic environment, ESA listed species and the shoreline habitats upon which they depend are adequately protected.

Recommendation: Develop a path forward and firm schedule to engage in a regional dialogue regarding implementation of HAT as the landward extent of the CWA Section 404 jurisdiction for the protection of critical shoreline habitat in all marine and estuarine areas in Washington State. This dialog should be conducted in coordination with NMFS, EPA, tribes, the State of Washington and others to gain full understanding of the full variety of options, including the application of the independent authorities of all agencies, to achieve the stated goal of increased habitat protection.

Desired outcome: Switch from using MHHW to HAT for defining the jurisdictional limits of the CWA in tidal waters.

Remaining Challenges: The Corps cannot use HAT as the line for 404 jurisdiction because Corps regulations establish that the "high tide line" is the height reached by a rising tide that encompasses *periodic frequency*. The definition suggests in the absence of actual data for high tide line that it's appropriate to rely on physical markings or characteristics that delineate the general height reached by a rising tide. Any proposed changes to the definition of high tide line would require joint rule-making by the EPA and the Corps at HQ. The recent Clean Water Rule proposed by the Corps and EPA addressed the part of the regulation where high tide line is defined and no changes to the long-standing definition of high tide line were proposed or considered.

Background: Currently, NWS uses the MHHW datum to define the *high tide line* used in jurisdictional determinations for permitting under Section 404 of the Clean Water Act. However, the MHHW is exceeded several days each month; the HAT is actually the highest tide occurring within Puget Sound. Using HAT as the high tide line affords greater protection for the aquatic environment.

According to the USACEs' regulations, "*high tide line*" means the line of intersection between the land and the water's surface at the maximum height reached by a rising tide. It encompasses spring high tides and other high tides occurring with periodic frequency but does not include storm surges (Clean Water Act (33 CFR § 328.3(d))). MHHW is not an upper limit of tidal waters; rather, it is a calculated average of all the higher of the two daily high tides over the 19 year tidal cycle. HAT is a one-time prediction of the highest tide occurring in the 19 year tidal cycle. Currently the USACE determination, as applied in Washington State, has indicated that, HAT does not meet the USACE' definition of high tide line as it does not occur "with periodic frequency". However, other agencies as well as the Treaty Tribes in Puget Sound do not concur with this determination.

The National Marine Fisheries Service (NMFS) uses the extreme high tide line as the landward boundary when designating critical habitat for ESA-listed salmon. The HAT boundary is the same as the extreme tide line. The upper limit of nearshore critical habitat for salmon in Puget Sound is the same as HAT, i.e., the "area inundated by extreme high tide" (70 FR 52637, Sept 2, 2005). Recovery of nearshore salmon critical habitats will continue to be impaired by the continued use of MHHW for USACE jurisdiction.

The Treaty Tribes, NMFS, EPA and NWS have been working on this issue for several years. In 2014, the NWD Commander indicated he did not intend to change the NWS approach for establishing jurisdiction under Section 404 of the CWA. However, in March 2015, NMFS provided additional information to USACE Northwestern Division (NWD) for consideration and received a response from BG Kem in July 2015 inviting them to join in a regional dialogue regarding the technical interpretation and application of discretion in identifying the landward extend of the CWA Section 404 jurisdiction in all marine and estuarine areas in Washington State, not just Puget Sound. This dialog is critical to gain full understanding of the full variety of options, including the application of the independent authorities of all agencies, to achieve the stated goal of increased habitat protection.